No. 15116

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES, APPELLANT

v.

MAR-LE WENDT AND ALBERT D. ROSELLINI, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

The jurisdiction of the district court was invoked under 28 U. S. C. 1346 (b) of the Federal Tort Claims Act. The jurisdiction of this Court rests upon 28 U. S. C. 1291 by reason of a notice of appeal filed February 1, 1956, from a judgment against the United States entered on December 7, 1955 (R. 70–72).

STATEMENT

This is an appeal from a judgment holding the United States liable under the Federal Tort Claims Act for personal injuries sustained by appellee Wendt and for property damage sustained by appellee Rosellini. The case arose from a collision between Rosellini's vehicle, operated by Mrs. Wendt, and a

truck-trailer owned by the United States but loaned to the Washington National Guard and operated by Sgt. William Brown, a Washington National Guardsman assigned to full time civilian caretaker duties for his National Guard Unit.

Brown was a sergeant in Battery C, 770th AAA Battalion, a unit of the National Guard of the State of Washington stationed at the armory in Seattle (R. 76). This unit, while federally recognized, was not then in the federal service nor on any "active federal duty" (R. 75).

As a sergeant in the Washington National Guard, Brown drilled one night a week and was paid about $6.00 per drill by check issued by the United States Army Finance Center in Seattle (R. 58, 77). Brown was also employed as a full time civilian unit "material caretaker for [his] National Guard" unit, *i. e.,* Battery C of the 770th AAA Battalion of the State of Washington National Guard (R. 77). For this employment Brown was paid about $315.00 monthly by check issued by the same United States Army Finance Center (R. 59, 78).

General Wilburn Stevens, who is the Adjutant General of the Washington National Guard and thus charged with the "supervision and training of the Washington National Guard under the direction of the Governor" of that State, described the "manner and nature of hiring of civilian personnel known as unit caretakers" (R. 140). He testified that "usually the unit commander [of the particular Washington National Guard unit] selects a man from his unit because the man, if he is to act in the capacity of

the caretaker * * * must be in the unit where he takes care of the property. Therefore, the unit commander is usually the man who hires the man and the papers are sent forward to my headquarters" (R. 140–141).

Pursuant to this established procedure of having the unit caretaker selected and hired by the unit commander, Brown, in order to get his job as unit caretaker, was interviewed by the Company Commander of Battery C at the Seattle Armory and by the personnel officer there (R. 79). He was also interviewed for the job at Camp Murray, which is the National Guard Headquarters for the State of Washington, by Col. Hagen, "a national Guard officer" and not a "regular army officer," who was Acting United States Property and Disbursing Officer for the Washington National Guard (R. 80, 188). "Any order that is issued out of [Col. Hagen's] office to any National Guard personnel is issued in the name of the Adjutant General" of the State of Washington (R. 203).

The hiring of Brown as unit caretaker for Battery C—which, like his firing, rested in the discretion of the State Adjutant General—was formalized in appointment papers issued by "Headquarters Military Department, State of Washington, Office of the Adjutant General" (R. 59, 188). As a unit caretaker, Brown's duties included "looking after" federal equipment and property loaned to his State and assigned to his unit, minor mechanical repairs on the equipment and the drawing of such equipment at the

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State Headquarters in Camp Murray for use of his unit in Seattle (R. 59, 80–81, 145–147, 184). He also prepared, as a unit caretaker, the unit's "payrolls, morning reports, sick reports, report of change and a thousand and one reports which the company commander, being only a part time man, he can't take care of that" (R. 146). Generally, Brown was "the right-hand man to the unit commander" in getting this work done (R. 146).

On March 11, 1953, the day of the accident, Brown was directed by his unit commander and by his Battalion Administrative Officer, pursuant to an order issued by "Headquarters, Military Department, State of Washington, Office of the Adjutant General, Camp Murray, Washington," to proceed from Seattle to Camp Murray, draw a truck and trailer there, and drive it back to Battery C at Seattle (R. 59, 60, 82, 103, 131–132). Brown, complying with this State National Guard order, arrived at Camp Murray and took delivery of a United States Army 2½-ton truck which was then "on loan to the [Washington] National Guard for the purpose of training personnel and transporting equipment and personnel of the [Washington] National Guard" (R. 62–63). At the same time, a trailer was delivered at Camp Murray to another unit caretaker for Battery B of the 770th AAA Gun Battalion (R. 60).

Although the truck was equipped with a 12-volt electrical brake connection system and the trailer had a 6-volt brake system, the trailer was coupled onto the truck which had been delivered to Brown (R. 60–61). The district court found that Col. Hagen, the Prop-

erty Officer, "authorized and directed that said truck and trailer be issued to Brown" (R. 65). Because of the incompatible voltage, the brake line from the cab of the truck could not control the brakes on the trailer (R. 61, 65).

Brown, while driving the truck and trailer back to Seattle, was travelling in a northerly direction along U. S. 99 near Tacoma at the time of the accident (R. 61). Rosellini's vehicle, operated by Mrs. Wendt, was travelling in the opposite direction (R. 61). In order to avoid a parked Pacific Telephone and Telegraph Company truck which blocked one of the northbound lanes of U. S. 99, Brown applied his brakes (R. 61, 63). The weight of the unbraked trailer pushed the rear of the truck to the east, resulting in forcing the front part of the truck to the west or to the left and into the southbound lane, striking the oncoming car driven by Mrs. Wendt (R. 61, 99).

This suit was then filed against the United States under the Federal Tort Claims Act in the district court (R. 3). The complaint, seeking damages for Mrs. Wendt's personal injuries and the property damage to Mr. Rosellini's vehicle, alleged that Brown was an employee of the United States acting within the scope of his employment and that he negligently operated the truck and trailer without adequate brake connections (R. 4). Another action was filed by the same appellees against the Pacific Telephone and Telegraph Company, alleging negligence on the part of that company in failing to post adequate signals a sufficient distance south of the point on U. S. 99 where

their parked truck was blocking one of the lanes, thereby causing the truck-trailer driven by Brown to swerve over into the southbound lane. Both actions were consolidated in the court below (R. 39).

The United States, in answering, denied that Brown was negligent and denied that he was a federal employee (R. 10). In addition, the answer asserted, by way of a separate affirmative defense, that Brown was an employee of the State of Washington Military Department and that there could therefore be no recovery against the United States under the Federal Tort Claims Act (R. 12–13).

After trial, the district court ruled that Brown, at the time of the accident, was an employee of the United States acting within the scope of his employment as a unit caretaker and that he was negligent in operating the truck and trailer at a greater speed than was proper in view of the lack of adequate brake connections (R. 66). The court further ruled that Col. Hagen was an employee of the United States, that he was acting within the scope of his employment as United States Property and Disbursing Officer in authorizing the issuance of the truck and trailer to Brown, and that this authorization was negligent (R. 67). Finding further that the Telephone Company was not negligent, and that Mrs. Wendt was not guilty of contributory negligence, the court entered judgment against the United States on December 7, 1955, in the sum of $56,404.75 for Mrs. Wendt's personal injuries and in the sum of $1,392.33 for the damage to Mr. Rosellini's car (R. 68, 71).

QUESTION PRESENTED

Whether (a) a Washington National Guard enlisted man employed as a unit caretaker by his Washington National Guard unit which has not been ordered into the federal service and (b) a Washington National Guard officer detailed to the Washington National Guard Headquarters as United States Property and Disbursing Officer for the State of Washington are "employees of the [federal] Government" within the meaning of that term as used in the Federal Tort Claims Act so as to make the United States liable for their negligence.

STATUTES INVOLVED

1. The pertinent sections of the Federal Tort Claims Act, as codified in Title 28, U. S. C., provide:

§ 1346. United States as defendant

* * * * *

(b) * * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2671. Definitions

As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

"Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

2. The pertinent sections pertaining to the National Guard, as codified in Title 32, U. S. C., provide:

§ 42. Care of animals; armament, etc.

Funds allotted by the Secretary of the Army for the support of the National Guard shall be available for the purchase and issue of forage, bedding, shoeing, and veterinary services, and supplies for the Government animals issued to any organization, and for animals owned or hired by any State, Territory, District of Columbia, or National Guard organization, not exceeding the number of animals authorized by Federal law for such organization and used solely for military purposes, and for the compensation of competent help for the care of material, animals, armament, and equipment of organizations of all kinds, under such regulations as the Secretary of the Army may prescribe.

The compensation paid to caretakers who belong to the National Guard, as herein authorized, shall be in addition to any compensation authorized for members of the National Guard under any of the provisions of this title.

* * * * *

Funds hereafter appropriated under the provisions of this title, as amended, for the support of the National Guard of the several States, Territories, and the District of Columbia, shall be supplemental to moneys appropriated by the several States, Territories, and the District of Columbia, for the support of the National Guard, and shall be available for the hire of caretakers and clerks: *Provided*, That the Secretary of the Army shall, by regulations, fix the salaries of all caretakers and clerks hereby authorized to be employed, and shall also designate by whom they shall be employed.

§ 42a. Same; hire of caretakers for clerical work

Moneys hereafter appropriated under the provisions of this title, as amended, for compensation of help for care of material, animals, armament, and equipment in the hands of the National Guard of the several States, Territories, and the District of Columbia shall be available for the hire of caretakers who may also perform clerical duties incidental to their employment, and such moneys may be used as supplemental to money appropriated by the several States, Territories, and the District of Columbia for the support of the National Guard: *Provided,* That nothing herein con-

tained shall be construed to prevent the utilization of the services of such caretakers on duties other than those indicated above, if such additional services do not interfere with the complete performance of the duties for which they are employed under the provisions of this section: * * *.

§ 49. Property and disbursing officers

The Governor of each State and Territory and the Commanding General of the National Guard of the District of Columbia shall appoint, designate, or detail, subject to the approval of the Secretaries of the Army and Air Force, a qualified officer of the National Guard of the United States or the Air National Guard of the United States, who is an officer of the National Guard or Air National Guard of the State, Territory, or District of Columbia and who shall be the United States property and fiscal officer. The President may with the consent of the officer concerned, if such officer is not on active duty, order him to active duty to serve as United States property and fiscal officer of the State, Territory, or the District of Columbia, for which appointed, designated or detailed, and upon relief from assignment as United States property and fiscal officer, he shall revert to his National Guard or Air National Guard status. The United States property and fiscal officer shall receipt and account for all funds and property belonging to the United States in possession of the National Guard or Air National Guard of the State, Territory, or the District of Columbia, and shall make such returns and reports pertaining there-

to as may be required by the appropriate Secretary. Before entering upon his duties as property and fiscal officer he shall be required to give good and sufficient bond to the United States, the amount thereof to be determined by the Secretaries of the Army and the Air Force, for the faithful performance of his duties and for the safekeeping and proper disposition of the Federal property entrusted to his care. He shall receive pay and allowances provided by law. The appropriate Secretary shall cause an inspection of the pertinent accounts and records of the United States property and fiscal officer to be made by an Inspector General of his Department at least once each year. The Secretaries shall make joint rules and regulations necessary to carry into effect the provisions of this section, which rules and regulations shall establish a maximum grade, not above colonel, for the United States property and fiscal officer of each State, Territory, and the District of Columbia, which grade shall be commensurate with the duties, functions, and responsibilities of the office.

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in holding that Sgt. William Brown and Lt. Col. Hagen were federal employees within the meaning of that term as used in the Federal Tort Claims Act.

2. The district court erred in holding that Sgt. Brown and Lt. Col. Hagen were acting within the scope of their employment for the United States within the meaning of the Federal Tort Claims Act.

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3. The district court erred in rendering judgment for the plaintiffs against the United States.[1]

SUMMARY OF ARGUMENT

The judgment entered by the court below against the United States in this Federal Tort Claims Act suit is predicated on its holding that certain state National Guard personnel, *i. e.,* unit caretakers and property and disbursing officers, are "federal" rather than state employees. The correctness of that holding is the basic question presented by this appeal.

We believe that the holding constituted plain and reversible error. In Point I, we show that application of the conventional "control" test, which is the touchstone for determination of the existence of an employment relationship, compels the conclusion that the unit caretaker and the property officer are state rather than federal employees. This conclusion is firmly supported by two fundamental considerations discussed in Points II and III (pp. 26, 31): (1) the constitutional and historical development of the Na-

[1] The record also makes it plain that the court below committed additional reversible error in holding that Sgt. Brown and Lt. Col. Hagen were negligent in refusing to admit into evidence certain Government exhibits. While we in no way abandon those points, we do not stress them here because we believe it important to focus attention on the more serious error committed by the court in holding that Brown and Hagen were not state employees but were federal employees for whose torts the United States Government must respond under the Federal Tort Claims Act.

tional Guard as a state organization except when called into active federal service and (2) the long line of consistent holdings that National Guardsmen, not called into federal service, are not federal employees under the Federal Tort Claims Act.

Point IV reinforces even further the view that the Washington Guard personnel here involved are not federal employees for whose torts the United States Government, rather than the State of Washington, must respond. We show there that the federal aid extended to the state National Guards is only one aspect of the tremendous grant-in-aid program under which the national Government finances and subsidizes multitudinous local projects carried on by the state employees. Imposition of liability on the United States for extending federal aid to the National Guards is, we submit, as improper as would be the imposition of liability for federal financial assistance to any of the other state-operated projects. Against this background, we submit that it would require unequivocal language in the Federal Tort Claims Act before the door of the federal treasury is opened up to the tremendous number of potential claims based on federal financial participation in state National Guard or other grant-in-aid programs. There is, of course, no such clear declaration of liability in the Federal Tort Claims Act. Indeed, nowhere in the Act is there even a remote suggestion of potential federal liability for such claims.

ARGUMENT

I

Federal liability is precluded here because the United States had no right of control over the unit caretaker and the property officer

The basic test in determination of the existence of an employment relationship for the purpose of imposing vicarious liability on an employer for the negligent conduct of his employee always has been whether the employer had the right to control the employee in the activities which gave rise to the tortious misconduct. Application of that test to the facts of this case conclusively establishes that neither Brown, the unit caretaker, nor Hagen, the property officer, were employees for whose torts the United States may be held liable under the Federal Tort Claims Act.

A. Tort liability of an employer is predicated on his right to control the employee's conduct

Although many factors are considered in determining whether or not an individual is an employee of the defendant for the purpose of saddling the defendant with a tort liability for the negligence of the alleged employee, the basic criterion at all times has been the defendant's right of control. Consistent holdings uniformly recognize that an essential element of the employer's vicarious liability in tort is that the employer must have the right and power to direct and control the employee in the performance of the negligent act or omission which caused the injury. *Board* v. *Hearst Publications,* 322 U. S. 111, 120–121,

128; *The Standard Oil Co.* v. *Anderson,* 212 U. S. 215, 221; *Harris* v. *Boreham,* 233 F. 2d 110, 115–116 (C. A. 3); *Beck* v. *Washington, Virginia & Maryland Coach Co.,* 220 F. 2d 830, 831 (C. A. D. C.); *Baber* v. *Akers Motor Lines,* 215 F. 2d 843, 845 (C. A. D. C.); *United States* v. *Eleazer,* 177 F. 2d 914, 916–7 (C. A. 4), certiorari denied, 339 U. S. 903); *Craige* v. *Austin Powder Co.,* 91 F. 2d 664 (C. A. 4); *P. F. Collier & Son Co.* v. *Hartfeil,* 72 F. 2d 625 (C. A. 8); *Phelps* v. *Boone,* 67 F. 2d 574 (C. A. D. C.), certiorari denied, 291 U. S. 677; *Standard Oil Co.* v. *Parkinson,* 152 Fed. 681, 682 (C. A. 8); *Brady* v. *Chicago and G. W. Ry. Co.,* 114 Fed. 100 (C. A. 8); *Leech* v. *Sultan R. & Timber Co.,* 161 Wash. 426, 297 Pac. 203; *Beasely, Etc.* v. *Whitehurst,* 152 Va. 305, 311, 147 S. E. 194, 196; *Restatement, Agency,* § 228, comment c; § 229, comment c.

As summarized in *Phelps,* "The usual test" for "determination of liability for a negligent act on the part of a servant, is the right or the power on the part of the person charged, to command and control the servant in the performance of the causal act at the moment of performance." 67 F. 2d at 575. "And," as observed again in *Baber* v. *Akers Motor Lines,* 215 F. 2d 843, 845, "this right of control and direction we think has to do with the operation of the car, not merely with control of the destination." Adhering to the same rule in Washington, the *Leech* case points out that to establish the master-servant relationship for the purposes of a *respondeat superior* liability, it must at least be shown that the master had full control, or the right to control, the manner and

details of the servant's activities at the time of the accident. 161 Wash. 426, 427, 297 Pac. 203, 204.[2]

Similarly, the late Judge Sanborn, in reiterating the rule, observed that:

> The test of one's liability for the act or omission of his alleged servant is his right and power to direct and control his imputed agent in the performance of the causal act or omission at the very instant of the act or neglect. There can be no recovery of a person for the act or omission of his alleged servant under the maximum, "respondeat superior," in the absence of the right and power in the former to command or direct the latter in the performance of the act or omission charged, because in such a case there is no superior to respond. [*Standard Oil Co.* v. *Parkinson,* 152 Fed. 681, 682 (C. A. 8).]

The *Restatement,* recognizing that the basic precondition of an employment relationship for the purpose of imposing tort liability on an employer is the right of control on the part of the employer, defines a servant as "a person employed to perform service for another in his affairs and *who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control.*" [Emphasis supplied.] *Restatement, Agency,* 220 (1).

The same rule has always applied to suits under the Federal Tort Claims Act. Thus, when the Tort

[2] The holding that the tortfeasor was not defendant's employee was based squarely on the fact that the defendant had no "control or supervision of Jones in the operation of the car, or the manner in which delivery * * * was to be effected." *Leech* v. *Sultan R. & Timber Co.*, 161 Wash. 426, 433, 297 Pac. 203.

Claims Act was a relatively new statute, Chief Judge Parker enunciated the rule in exonerating the Government from liability under the Tort Act (*United States* v. *Eleazer,* 177 F. 2d 914, 916 (C. A. 4), certiorari denied, 339 U. S. 903):

> The ground of liability of the master for the negligent act of the servant is that the * * * master * * * has the right of control * * *.

Recently, the Third Circuit, in a case strikingly similar to the one now here, again emphasized that the "control" test is dispositive in determining whether the tortfeasor is an employee of the United States for the purpose of Tort Claims Act liability. *Harris* v. *Boreham,* 233 F. 2d 110, 116. This Third Circuit case was decided by a panel including Chief Judge Magruder and Judge Maris. The question there, like the question here, was whether the tortfeasor was a federal employee or an employee of a local government. There, as here, his salary was "paid from federal funds." 233 F. 2d 110, 115. But the court correctly observed that that "merely" meant that "Congress was willing to this extent to subsidize the local government." 233 F. 2d 110, 115. And, in ruling that he was a local employee because he was not "under the supervision and control" of the United States, Judge Maris' opinion states (233 F. 2d 115–116):

> Boreham, the Superintendent of Public Works of the Municipality of St. Thomas and St. John, was in charge of a department of the government of that municipality under the general supervision and control of the Gov-

ernor. It is true he had been appointed to that office in 1935 by the Secretary of the Interior upon the recommendation of the Governor of the Virgin Islands, and had continued in office after the passage of the Organic Act of 1936. It is also true that his salary was paid from federal funds appropriated by Congress for the Government of the Virgin Islands and the municipalities. It is upon these facts that the plaintiff bases her contention that Boreham must be regarded as having been, at the time here involved, an employee of the Government of the United States within the meaning of the Federal Tort Claims Act. We do not think that this conclusion follows.

Aside from the letter appointing him to the position, the record does not disclose any order or directive issued by the Secretary of the Interior or any other department or agency of the United States in respect to Boreham's duties as Superintendent of Public Works of the Municipality of St. Thomas and St. John. *On the contrary it appears that his duties were being performed under the supervision and control of the chief executive of the municipality, the Governor.* * * * We are satisfied that Boreham does not come within this definition [of federal employee, 28 U. S. C. 2671, pp. 7–8] for he was not an officer or employee of a federal agency nor was he, in supervising the maintenance of the streets of Charlotte Amalie, acting on behalf of such an agency. On the contrary it is clear that he was an official of the Government of the Municipality of St. Thomas and St. John which, as we have pointed out, was a body politic quite distinct from the Gov-

ernment of the United States and was, therefore, not a "federal agency" within the meaning of the Act.[3] [Emphasis supplied.]

B. The State of Washington and not the United States had the right of control over the unit caretaker and the property officer

Applying the fundamental "control" test to the facts of this case, we now show that the State of Washington rather than the Federal Government had the responsibility and authority to supervise and control the activities of (1) Brown as unit caretaker and (2) Hagen as property officer.

1. *Brown, the Unit Caretaker.* There can be no dispute that the decision to hire Brown as a unit caretaker[4] and the examination of his qualifications

[3] See also Chief Judge Hutcheson's recent holding that the United States, in a Federal Tort Claims Act suit, cannot be held liable under *respondeat superior* where "no control whatever" is assumed by the United States. *Moye* v. *United States*, 218 F. 2d 81, 83 (C. A. 5). For further application of the rule, see the recent opinion by Chief Judge Magruder in *Conversions & Surveys* v. *Roach*, 204 F. 2d 499 (C. A. 1). The basic question in that case was whether the employer could be held liable under *respondeat superior* for the employee's negligent operation of his privately owned car. In holding that there was no liability, Chief Judge Magruder noted that there was no "evidence warranting the inference that the owner, while permissively using his car on company business, has yielded up to his employer this right to control speed, route, and the other details of operation." 204 F. 2d 499, 501.

[4] The unit caretaker is a position long established in the National Guard. For many years prior to 1916, militia target range caretakers were utilized by National Guard units. Par. 19, NGR 78, 1 Nov 27, points out that target range-keepers "will be *employed by State* authorities at federal expense * * *" (emphasis supplied). The first statutory authorization for the position, however, appeared in Section 90 of the National Defense Act of 1916 (32 U. S. C. 42, 42a, p. 8). This statute has been amended nine times since 1916. The legislative re-

for that job were made by Washington National Guard officers and not by any federal officials. The record establishes that the routine procedure was for the unit caretaker to be selected and hired by the

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ports on the various amendments consistently allude to the fact of state control over these employees. H. Rep. No. 674, 67th Cong. 2d Sess.; H. Rep. No. 397, 68th Cong., 1st Sess.; Sen. Rep. No. 785, 69th Cong., 1st Sess.; H. Rep. No. 400, 70th Cong., 1st Sess.; Sen. Rep. No. 118, 73d Cong., 1st Sess.; Sen. Rep. No. 635, 74th Cong.; 1st Sess.; H. Rep. No. 2104, 75th Cong., 3d Sess.; Sen. Rep. No. 1788, 75th Cong.; 3d Sess.; see H. Rep. No. 2681, 75th Cong., 3d Sess.; H. Rep No. 2986, 76th Cong., 3d Sess., H. Rep. No. 2814, 76th Cong., 3d Sess.; Sen. Rep. No. 1788, 76th Cong., 3d Sess.

The existence of state rather than federal control is shown still further by the fact that the caretaker is hired and discharged locally by the authority of the several Adjutants General of the various states, territories, and the District of Columbia. R. 188; par. 1, NGR 75–16, 29 Dec. 47, pp. 42a–53a; pars. 4, 5, NGB Cir 4, 23 Jan 50. He is not entitled to federal retirement benefits and is not an employee of the United States under the Civil Service System. *Federal Personnel Manual*, Chapter R5–20. He is covered by Federal Social Security only if the state which employs him makes a pro rata contribution to the system on his behalf. His employment is directed, in its day-to-day detail, by his unit commander or the unit administrative assistant (par. 2.b.1, NGR 75–16, 29 Dec 47, p. 43a; par. 4, NGB Cir 4, 23 Jan 50), and he is instructed and trained by his unit commander in the performance of his duties (par. 2, NGR 75–3, 2 Feb 51). In view of this day-to-day control by state officers and the complete lack of control by any federal officers, par. 26.k.1, NGR 50 (2 Nov 46) notes that:

"Employees hired by the States and Territories, including United States property and disbursing officers, accounting employees, caretakers, range keepers, temporary laborers, and others, are not considered federal employees, although paid from funds appropriated for the National Guard (27 Comp. Dec. 344, 19 Comp. Gen. 326 and 21 *id.* 305); Therefore, deductions for Civil Service retirement will not be made from the pay of these employees except in the District of Columbia."

commander of the appropriate Washington National Guard unit, unquestionably a state officer (R. 140–141). Thus, Brown, in order to get the job as unit caretaker, was interviewed by the Company Commander of Battery C, 770th AAA Battalion, Washington National Guard (R. 79). He was also interviewed for the job at Camp Murray, which is not a federal Army post but is the National Guard Headquarters for the State of Washington (R. 80, 188, 203). The selection of Brown as caretaker was formalized by appointment papers issued not by any federal officer but by state officers of the "Headquarters, Military Department, State of Washington, Office of the Adjutant General" (R. 59, 188).

Similarly, all of the orders to Brown directing the discharge of his unit caretaker duties were issued by the state officers of the Washington National Guard and never by any federal officers. Accordingly. it was pursuant to orders of these state officers that Brown, at the time of the accident, had been directed to draw certain equipment at Camp Murray and return it to Battery C, his Washington National Guard unit at Seattle (R. 59, 60, 82, 103, 131–132). The truck and trailer he drove back to Seattle, as ordered by the state officers, was federally owned but "on loan to the Washington National Guard" (R. 61–62).

The record thus establishes that Brown was hired by state officers of the Washington National Guard, that he received his orders from them, and that they directed every phase of his employment duties as a unit caretaker, including those he was performing at the time of his return trip to Seattle. In short, he

was then under the supervision and control of these state officers and not under the supervision and control of any United States Army or other federal personnel (R. 80). Since Brown was not under the supervision and control of federal employees, the district court erred, we submit, in concluding that he was employed by the United States within the meaning of the Federal Tort Claims Act.

2. *Hagen, the Property Officer.* Application of the same control test demonstrates that Col. Hagen, the United States property and disbursing officer for the Washington National Guard, was also not a federal employee under the Federal Tort Claims Act. The property officer is a state National Guard officer appointed by the governor of the state, subject to the approval of the Secretary of the Army or Air Force. 32 U. S. C. 49 (p. 10). This position was created for the purpose of assisting the various states in the protection of federal property and equipment furnished to the state for the use of its National Guard units and for which the governors of the individual states are responsible. 19 Comp. Gen. 326.[5]

At all times, as was true with respect to orders issued by Col. Hagen in this case, any order that is

[5] Par. 3, SR 130–420–1, 21 Nov 49, provides: "Definitions.—When used in these regulations, the words or terms given below will be construed to have the following meaning:

"a. United States property and disbursing officer (USP&DO).—An officer required to maintain accountability and prescribed records of supplies received or held for issue within the State, indicating by item, the receipt, issue or other disposition of such property. Such persons have supervisory responsibility for supplies on hand but not under their immediate control, as de-

issued by the property officer "to any National Guard personnel is issued in the name of the Adjutant General" of the state rather than in the name of any federal officer (R. 203). The record here also establishes that Col. Hagen was not subject to any federal control because at all times he was subject to the supervision and control of the Adjutant General of the State of Washington, who could exercise this control by overruling the property officer or countermanding his orders (R. 203). The exercise of this close control by the State Adjutant General over the property officer is further manifested by the fact that the property officer's principal responsibilities included "acting as his adviser in logistical matters and as a staff officer on his staff" (R. 202, 203).

This supervision and control by state officers, just as in the case of unit caretakers, require, we submit, a holding that the property officer is a state employee, notwithstanding the fact that his appointment is approved by the Secretary of the Army or Air Force and his pay is derived from funds appropriated by the United States for the support of the local National Guards. See *Harris* v. *Boreham,* 233 F. 2d

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fined in AR 35–6520. This officer is accountable for Federal property issued the State. (See sec. 67, National Defense Act, as amended.)"

The background and reasons for the existence of the USP&DO are summarized in 27 Comp. Dec. 994, 995. See par. 6, SR 130–420–1, 21 Nov 49, for delineation of the responsibilities of the USP&DO.

110, 115, 116 (C. A. 3), pointing out that the absence of federal control precludes a finding of federal employment even though (1) the employee there involved was actually appointed by the United States Secretary of the Interior and (2) his salary was paid from federal funds appropriated by Congress. See also 19 Comp. Gen. 326; 21 Comp. Gen. 305; 29 Comp. Gen. 421; 27 Comp. Dec. 344; 29 Comp. Gen. 277; 22 Comp. Gen. 864.[6]

The same view—that a property officer is not a federal employee—recently has been reasserted by the United States Court of Claims in *Hyde* v. *United States,* 139 F. Supp. 752. The question in *Hyde* was whether the property disbursing officer for the State of Tennessee performed "active Federal service" creditable to federal retirement under the Act of June 29, 1948, 62 Stat. 1081, as amended, 63 Stat. 693. In its opinion the Court of Claims, after setting forth the text of the "property officer" provision of the National Defense Act of 1916, 32 U. S. C. 49 (p. 10), flatly rejects the contention that property officers perform federal services or are federal employees (139 F. Supp. 752, 756):

> From the reading of the above act it is apparent that plaintiff [i. e., the property officer] was under no "competent Federal

[6] In 22 Comp. Gen. 864 (March 4, 1943) the Comptroller General reaffirmed the position taken earlier in 19 Comp. Gen. 326, ruling that despite the name of their position, *i. e.*, "United States property and disbursing officers," these state National Guard officers are not officers of the United States.

orders" when he embarked on his duties in connection therewith. He merely was appointed by the Governor of Tennessee to do a job, and the fact that approval of his appointment by the Secretary of the Army was necessary, cannot be construed to mean he was "ordered to active duty under competent Federal orders."

U. S. property and disbursing officers are not subject to military orders or military disciplinary action. Plaintiff could quit at any time, could be removed by the Governor of Tennessee at any time, and could not be ordered out of the State of Tennessee. It would indeed be a novel situation wherein a man ordered to active duty under competent Federal orders could be so removed.

Furthermore, the act provides that the governor can appoint the adjutant general of the state to such position. Certainly the adjutant general cannot be said to be ordered to active duty under competent Federal orders. He would assume the mixed duties and responsibilities arising out of the Federal and State relationship with respect to National Guard matters. It is to be noted in that respect that the National Defense Act, supra, also provided a salary for the increased responsibilities. It is also to be noted that the salary authorized ($1,300 per annum) has no connection with any salary paid any member of the military forces of the United States. Furthermore, he could be prosecuted under Federal criminal law for the mishandling of Federal funds in his possession. *Woodford* v. *United States,* 8 Cir., 77 F. 2d 861. Nowhere does it appear that he

could be court-martialed therefor. Moreover, he has always been regarded as a state officer and not subject to the Federal annual leave laws. 19 Comp. Gen. 326.

Viewed in the light of the evidence and findings in this case, plaintiff's service as property and disbursing officer of the United States could not be considered as active Federal service within the meaning of section 303 of the Act of June 29, 1948, supra.

Nor can Col. Hagen's service here as property and disbursing officer for the State of Washington National Guard be considered "federal" service. To the contrary, application of the reasoning of the *Hyde* and *Harris* cases, and of the "control" test on which those two cases are based, compels the same conclusion here, *i. e.,* that Col. Hagen as property officer is not a federal employee within the meaning of that term as used in the Federal Tort Claims Act.

II

The historical development of the National Guard as a State organization confirms the view that National Guard unit caretakers and property officers are not Federal employees

In Point I we have taken the position that National Guard personnel, including caretakers and property officers, are state employees because daily control over their activities is reserved to and in fact exercised by the various states. This position is firmly supported by the traditional relationship between the Federal Government and the state National Guards. We now trace that relationship, based on the United States Constitution and statutes.

The National Guards of the several states are the militia recognized in Article I, Section 8, clauses 15 and 16, of the Federal Constitution. The history of the development of the National Guard from the disorganized and often undisciplined home-defense force which was the early militia has been a history of zealous retention by the states of control over their military forces against what were believed to be attempts to "federalize" the National Guard.[7] The result is that, although the process of development of the National Guard to an effective reserve component of the Army of the United States (Section 58 of the National Defense Act of 1916, as amended, 50 U. S. C. 1111, 1112) has been one of increased exercise by Congress of its constitutional power "To provide for organizing, arming, and disciplining" of the militia (U. S. Const., Art I, § 8, cl. 16), it is clear that the National Guard of a state still remains a state organization except when called into active federal service. Section 709 of the Armed Forces Reserve Act of 1952, 665 Stat. 503, 50 U. S. C. 1119, as if to eliminate all possible doubt on this score, provides in explicit terms that:

> Except when ordered thereto in accordance with law, members of the National Guard of

[7] For a history of the statutes relating to the National Guard and its predecessors, see Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940); Colby and Glass, *The Legal Status of the National Guard*, 29 Va. L. Rev. 839 (1943). For recent assurance that state control over the National Guard has not been impaired or the National Guard "federalized", see Sen. Rept. No. 1795, 82d Cong., 2d Sess., on the Armed Forces Reserve Act of 1952, pp. 11, 43.

> the United States and of the Air National Guard of the United States shall not be on active duty in the service of the United States. When not on active duty in the service of the United States, they shall be administered, armed, uniformed, equipped and trained in their status as members of the National Guard and Air National Guard of the several States, Territories, and the District of Columbia.

Certain qualifications for federal recognition of National Guard officers are of course established by federal law (32 U. S. C. 111–115). But Article I, Section 8, clause 16, of the Constitution specifically reserves to the states the power of appointment of officers, and Section 246 of the Armed Forces Reserve Act of 1952, 66 Stat. 495, 50 U. S. C. 981, provides that:

> When not on active duty, members of the reserve components shall not be held or considered to be officers or employees of the United States, or persons holding any office of profit or trust or discharging any official function under or in connection with any department or agency of the United States, solely by reason of their appointments, oaths, commissions, or status as such, or any duties or functions performed or pay and allowances received as such.

That the state National Guards remain under state control while not in active federal service is further manifested by the authority which the states exercise over these military forces. Although Section 61 of the National Defense Act, as amended, 32 U. S. C. 194, prohibits states from maintaining troops in time

of peace other than in accordance with the organization prescribed by that Act, it specifically provides that:

> * * * Nothing contained in this Act shall be construed to limit the rights of the States in the use of the National Guard within their respective borders in time of peace * * *.

The states may, and frequently do, use their National Guards to enforce state laws and to maintain peace and order. Both officers and enlisted personnel are required to take an oath promising to obey the orders of the governor of the state. 32 U. S. C. 112, 123.[8] And, as already noted, the Federal Constitution reserves to the states all authority over the appointment of officers. Moreover, the states "have the right to determine and fix the location of units and headquarters of the National Guard within their respective borders" (32 U. S. C. 6), and "* * * no change in allotment, branch, or arm of units or organizations wholly within a single State [can] be made without the approval of the governor of the State concerned" (32 U. S. C. 5).

[8] The required oath of allegiance is to both the United States and the state and the promise is to obey the orders of the President of the United States and those of the governor "* * * because the Governor is commander in chief of the National Gaurd until Congress declares an emergency to exist and the guard becomes an actual part of the National Army, when the President becomes commander in chief." *Bianco* v. *Austin*, 204 App. Div. 34, 197 N. Y. S. 328, 331. The President is "commander in chief of the militia only when called into the actual service of the United States." *Johnson* v. *Sayre*, 158 U. S. 109, 115.

It is true that certain standards are established by federal law for the instruction, training, and discipline of the state National Guards (32 U. S. C. 61–76), that provision has been made for the issuance of arms, equipment, material, uniforms, etc., to the state National Guards (32 U. S. C. 33), and that a sum of money is annually appropriated for payment out of the United States Treasury for their support. 32 U. S. C. 21. However, the only sanction to enforce compliance by the states with the standards established by the United States is the withdrawal of federal recognition and entitlement to the aids and benefits offered by the United States. 32 U. S. C. 24.

As this review of the constitutional and statutuory relationship between the National Guard and the United States shows, the National Guard possesses a dual character. It is both a state military organization and a reserve component of the Army of the United States. But the relationship between the National Guard and the United States, as explained above, leaves no doubt that members of the National Guard are only to be considered as in the active service of the United States when ordered thereto in accordance with law, and that at all other times National Guard personnel are state employees. Concededly, as the court below found (R. 63), the Washing National Guard unit here involved had not been ordered or called into "the active federal military services" at the time in question. It follows that the Washington National Guard personnel were then state and not federal employees.

III

The consistent holdings that National Guard personnel are not employees of the United States within the meaning of the Federal Tort Claims Act should be applied here

In view of the clarity with which the status of National Guardsmen is defined, it is not surprising to find that every court which has considered the question has held that guardsmen who have not been called to the active service of the United States, are not employees of the United States within the meaning of the Federal Tort Claims Act. See, *e. g., Dover* v. *United States,* 192 F. 2d 431 (C. A. 5); *Williams* v. *United States,* 189 F. 2d 607 (C. A. 10); *United States* v. *McCranie,* 199 F. 2d 581 (C. A. 5), certiorari denied, 345 U. S. 922; *Satcher* v. *United States,* 101 F. Supp. 919 (W. D. S. C.); *Glasgow* v. *United States,* 95 F. Supp. 213 (N. D. Ala.); *Mackay* v. *United States,* 88 F. Supp. 696 (D. Conn.). Indeed, it was well established before the passage of the Federal Tort Claims Act by decisions of both federal and state courts that such National Guardsmen were not officers, employees, or troops of the United States but the troops, employees, or agents of the states. *United States* v. *Dern,* 74 F. 2d 485 (C. A. D. C.); *O.–W. R. R. & N. Co.* v. *United States,* 60 C. Cls. 458; *Illinois Central R. R. Co.* v. *United States,* 60 C. Cls. 499; *Ala. Gt. Southern R. R.* v. *United States,* 49 C. Cls. 522; *Bianco* v. *Austin,* 204 App. Div. 34, 197 N. Y. S. 328 (App. Div., 1st Dept.); *Gibson* v. *State,* 19 N. Y. S. 2d 405, 173 Misc. 893 (C. Cls. N. Y.), affirmed, 21 N. Y. S. 2d 362; *Spence* v. *State,* 288 N. Y. S. 1009, 159 Misc. 797 (C. Cls. N. Y.);

Dicicco v. *State,* 273 N. Y. S. 937, 152 Misc. 541 (C. Cls. N. Y.); *Lind* v. *Nebraska National Guard,* 144 Neb. 122, 12 N. W. 2d 652; *Nebraska National Guard* v. *Morgan,* 112 Neb. 432, 199 N. W. 557; *Baker* v. *State,* 200 N. C. 232, 156 S. E. 917; *Globe Indemnity Co.* v. *Forrest,* 165 Va. 267, 182 S. E. 215; *State* v. *Industrial Commission,* 186 Wisc. 1, 202 N. W. 191; see also 19 Comp. Gen. 326; 17 Comp. Gen. 333.

Notwithstanding the foregoing considerations and the long line of decisions to the effect that National Guardsmen are not employees of the Federal Government within the meaning of the Federal Tort Claims Act, the Court of Appeals for the Tenth Circuit in *United States* v. *Holly,* 192 F. 2d 221, held that a unit caretaker of the Oklahoma National Guard was a federal employee within the meaning of the Tort Claims Act. The Fifth Circuit followed *Holly* in *United States* v. *Elmo,* 197 F. 2d 230, and *United States* v. *Duncan,* 197 F. 2d 233. *Holly* has also been accepted by a majority of the Court of Appeals for the Second Circuit in *Courtney* v. *United States,* 230 F. 2d 112.[9]

[9] However, as the dissent in the latter case points out, the majority opinion, as well as the *Holly* and *Elmo* cases, on which it is based, fail to recognize that supervision and control over the activities of the unit caretakers are retained by the states and cannot be exercised by the Federal Government. 230 F. 2d 115. Since members of the Guard must "come under such control of the federal government" to be its servants and since the unit caretaker and property officer do not come under such federal control, the dissent in the *Courtney* case correctly concludes that they may not be viewed as federal employees for whose torts the United States Government must respond. 230 F. 2d 115.

The trial court in this case also relied on the *Holly* decision in holding the Government liable (R. 216). The question, however, is an open one in this Circuit. It is our position that *Holly* was incorrectly decided and that the district court therefore erred in relying on it.

The *Holly* opinion cites no earlier holding in support of its conclusion. It seems instead to be grounded on the fact that caretakers are paid from federal funds. But it is, we submit, a complete non sequitur to infer from that fact alone that the caretaker is necessarily subjected to the type of supervision and control by the Federal Government sufficient to constitute him a federal employee for the purpose of assessing tort liability. *Harris* v. *Boreham,* 233 F. 2d 110, 116 (C. A. 3); *Glasgow* v. *United States,* 95 F. Supp. 213, 214 (N. D. Ala.) See also *Fries* v. *United States,* 170 F. 2d 726 (C. A. 6), cert. den. 336 U. S. 954. There are, as we show below, scores of instances where the Federal Government, through its subsidy and grant-in-aid program, finances state-operated projects. But, in the absence of control in the hands of the United States, there can be no federal liability. As the dissenting judge in *Courtney* v. *United States* declared in explaining his reasons for rejecting *Holly* and ruling that caretakers are not under the control of the United States and hence are not its employees (230 F. 2d 114, 115):

> * * * it is undisputed here that the decision to hire Truex [the unit caretaker] and the examination of his qualifications was made by National Guard officers, that he received his

training from National Guard officers, and that he received his orders and instructions from National Guard officers. From all that appears in the record Truex never had any contact in the course of his duties with any federal officer or employee. *Since Truex was under the supervision and control of persons who were not federal employees, it is difficult to conclude that he was employed and controlled by the United* States. It is not enough to say that he was paid from federal funds; members of the National Guard are themselves paid from federal funds, 32 U. S. C. A. Chapter 10, but this has not been held to make them federal employees.

* * * * *

But it seems to me that examination of the Defense Act itself reveals that the special authority of the Secretary of the Army with respect to caretakers extends only to the power to fix their salaries and designate by whom they are to be employed. 32 U. S. C. A. § 42. Apart from these powers he has no greater control over caretakers than over enlisted men and officers of the National Guard. With respect to all members of the federally recognized National Guard the Secretary has wide powers to prescribe regulations, but these are merely pursuant to the federal government's power to attach conditions to the use of federal funds; they do not indicate that members of the Guard have come under such control of the federal government as to be its servants. The Secretary of the Army himself would have no authority to issue an order directly to an officer or member of the guard nor to the caretaker involved here. He may merely prescribe regulations to which

the states must adhere if they wish to continue to receive federal funds for the employment of such caretakers. This view is reinforced by the clear indication in the Defense Act that the states have the duty of maintaining and protecting the federal property entrusted to them. 32 U. S. C. A. §§ 33, 417. *United States v. Holly, 10 Cir., 1951, 192 F. 2d 221; Elmo v. United States, 5 Cir., 1951, 197 F. 2d 230; and United States v. Duncan, 5 Cir., 1952, 197 F. 2d 233, stand squarely opposed to this conclusion, but they do not sufficiently distinguish between control of the caretakers and the attachment of conditions to the receipt of federal funds for their compensation.*

With the enormous proliferation of federal government activities directly and indirectly through subsidies and other types of remuneration, it seems to me a holding that Truex was a federal employee would open the door of the federal treasury to a great number of claims which Congress never had in mind. *The federal government is certainly not liable for the activities of every person into whose pay check federal funds ultimately find their way.* Nor can it make a difference that the federal government attaches some conditions to the use of those funds. I am unable to find the United States answerable for the acts of a caretaker like Truex without some more explicit statement by Congress that it so intends. [Emphasis supplied.]

The persuasive reasoning of this dissenting opinion is in no way answered by the majority opinion in *Courtney* or by the Tenth Circuit's opinion in *Holly*, on which the majority relies. We urge this Court,

therefore, to follow that reasoning and to hold that the National Guard personnel here involved, not being subject to the control of the United States, may not for that reason be deemed federal employees.

IV

In the absence of a clear and unequivocal declaration of liability in the Federal Tort Claims Act, Congress should not be presumed to have exposed the Federal Government to tort liability for its participation in the National Guard or any other grant-in-aid program

We have shown in Point I that there can be no liability here on the part of the United States because the employees involved were at all times subject to the supervision and control of state officials rather than federal. Indeed, the constitutional and statutory relationship between the United States and the state National Guards effectively precludes the exercise of such control by the Federal Government over National Guard personnel such as unit caretakers and property officers. See pages 26–30.

Appellees apparently mistake for control what were simply acts of assistance by the Federal Government through its provision of funds, equipment, and training facilities supplied to the state National Guard. However, the fact that the national Government extends financial and other aid to the state governments obviously does not convert the state employees administering the programs into federal employees for the purpose of holding the Federal Government liable for their torts. Any other conclusion would mean that the Federal Government, as a result of its present participation in numerous other grant-in-aid pro-

grams, could be held liable for an unlimited number of claims in staggering amounts. As noted in the *Courtney* dissent, affirmance of the judgment below that caretakers and property officers are federal employees "would open the door of the federal treasury to a great number of claims which Congress never had in mind." 230 F. 2d 116. For example, it would open the door to federal liability for federal aid granted to the states for:

1. Agricultural research.
2. Cooperative agricultural extension work.
3. Agricultural marketing services.
4. Donations of surplus agricultural commodities.
5. Resident instruction at land-grant colleges.
6. Airport construction.
7. Highways.
8. Civil defense equipment and supplies.
9. Natural disaster relief.
10. School lunches.
11. School construction in federally affected areas.
12. School operation and maintenance in federally affected areas.
13. Vocational education.
14. Public health services.
15. Construction of health facilities.
16. Crippled children's services.
17. Maternal and child health services.
18. Poliomyelitis vaccination.
19. Public assistance.
20. Child welfare services.

21. Vocational rehabilitation.
22. Employment security.
23. Low-rent public housing.
24. Slum clearance and urban renewal.
25. Fish and wildlife restoration and management.
26. State and private forestry cooperation.

The extent of federal participation in the enumerated programs is shown by the fact that *annual* federal payments to the states for these programs average approximately 2¾ billion dollars.[10] See *Report of the Commission on Intergovernmental Relations,* 84th Cong., 1st Sess., H. Doc. 198, June 28, 1955, p. 301; *A Description of Twenty-five Federal Grant-in-Aid Programs,* a report submitted to the Commission on Intergovernmental Relations, June 1955, p. 178.

Imposition of far-reaching liability on the Federal Government for subsidizing these vast grant-in-aid projects is a result which cannot be lightly attributed to Congress. Certainly, in light of the absence of any control by the Federal Government over the state employees who carry out these projects, it would at least require express and unequivocal language in the Federal Tort Claims Act to justify imposition of such a drastic liability under the Act. If Congress had intended such a change in the settled law and policy against federal responsibility for financial aid to state projects, it would, we submit, have been more specific. As stated by the Supreme Court in rejecting

[10] Cf. the federal budget for the year ending June 30, 1957, which earmarks 306 million dollars for the Army National Guard and 258 million dollars for the Air National Guard.

for the same reason other claims under the Tort Claims Act, "We cannot impute to Congress such a radical departure from established law in the absence of express congressional command." *Feres* v. *United States,* 340 U. S. 135, 146.

There is, of course, no express congressional command in the Tort Claims Act on which appellees can rely in seeking to impose liability on the United States for its participation in the National Guard or any other grant-in-aid program. The absence of such an express command, we submit, is fatal to appellees' claims under the Act.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment below should be reversed with instructions to dismiss the complaint filed against the United States.

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